Fair Up or Down Vote

May 12, 2005

Noteworthy

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MYTH: Judicial nominations have always needed at least 60 votes to be confirmed, just as a matter of practice.

FACT: False. The Senate has always viewed the constitutional standard for confirmation to be a simple majority. For example, the following Carter and Clinton judges were confirmed with fewer than 60 votes:

Richard A. Paez (9th Cir.), confirmed, 59-39, on Mar. 9, 2000 William A. Fletcher (9th Cir.), confirmed, 57-41, on Oct. 8, 1998 Susan O. Mollway (D. Hawaii), confirmed, 56-34, on June 22, 1998 Abner Mikva (D.C. Cir.), confirmed, 58-31, on Sept. 25, 1979 L. T. Senter (N.D. Miss.), confirmed, 43-25, on Dec. 20, 1979

Shouldn't every nominee be treated the same, regardless of who is President?

Anatomy of a legal smear: Justice Owen

THE OREGONIAN
By DAVID REINHARD
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There may be worse things you can call a judge, but "judicial activist" has become one of today's top epithets. President Bush makes clear he doesn't want them in the federal judiciary; he opposes judges who legislate from the bench. And even liberals who so often celebrate the latest judge-made law and the republic's "living Constitution" -- in brief, champions of judicial activism -- tell us that there's really no such thing as a judicial activist. They're just judges doing the old-fashioned job of judging.

Except, when they're telling us there are conservative judicial activists. You know, the ones Bush is trying to pack our courts with and Senate Democrats and their allies have kept from receiving an up-or-down vote.

It's a curious way to nix Bush's appeals-court nominees -- claim they're actually the kind of judges Bush says he opposes. The implication is that Bush is either stupid or a conniving hypocrite or both, which seems to be the left's view of Bush.

A look at their judicial records will unmask this for the absurd claim it is, but that's what you get from groups such as People for the American Way and NARAL Pro-Choice America that oppose Bush's appellate picks. And, in the case of Texas Supreme Court Justice Priscilla Owen -- "a judicial activist who would allow her right wing ideology to trump her responsibilities as a judge to follow the law, not make it" (People for the American Way) and a nominee whose 4-year hold-up could trigger a change in Senate rules next week -- they add a special touch. They try to turn Bush's former White House counsel and current Attorney General Alberto Gonzales against one of Bush's nominees on the issue of judicial activism.

"Owen has demonstrated her willingness to legislate from the bench," NARAL has declared, "to give effect to her personal political views -- what . . . former fellow Texas Supreme Court Justice Alberto Gonzales called an 'unconscionable act of judicial activism.' "

Powerful stuff, right? Maybe, if you aren't familiar with the Texas case in question. Or if you are familiar with it and don't mind mischaracterizing Gonzales' words in order to keep Owen off the U.S. Court of Appeals for the Fifth Circuit after four years of waiting.

The case was Jane Doe 1 (II). In a 6-3 decision, the Texas Supreme Court reversed the trial court and appeals court to allow a girl to have an abortion without notifying her parents. The majority held that she met the requirements to obtain a judicial bypass under the state's parental-notice law. Gonzales was in the majority, Owen, the minority. Both wrote their own opinions.

Yes, Gonzalez wrote the words "unconscionable act of judicial activism." But he was pointedly answering Justice Nathan Hecht's dissent, not Owen's. Hecht had roasted the majority for its judicial activism, writing, "[T]he Justices in the majority are determined to construe the . . . Act as they personally believe it should be construed and not as the Legislature intended."

Gonzales was responding to Hecht's charge when he wrote in defense of the majority: "To construe the . . . Act so narrowly as to eliminate bypasses, or to create hurdles that simply are not to be found in the words of the statute, would be an unconscionable act of judicial activism."

But he wasn't even accusing the minority of such an "unconscionable act"; he acknowledged that "every member of this Court agrees that the duty of a judge is to follow the law as written by the Legislature."

Owen's dissent in this "close" case concerned the proper role of appellate courts. "The question in this case is not whether this Court would have ruled differently when confronted with all the evidence that the trial court heard," she argued. "The question is whether legally sufficient evidence supports the trial court's judgment. The answer to this latter question is yes. Longstanding principles of appellate review and our Texas Constitution do not permit this Court to substitute its judgment for that of the trial court and or to ignore the evidence, as it has done."

This seems like one essential tenet of judicial restraint in particular and judging in general. Then again, you'd expect no less from one of the few judicial nominees ever to gain a unanimous "well qualified" rating from the American Bar Association, as well as the unqualified support of Alberto Gonzales, who seems to be NARAL and People for the American Ways' new best legal authority.

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Unprecedented Obstruction
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The nation is now deep into its eleventh year during which the membership of the U.S. Supreme Court has not changed. That time span, which dates to August 1994, is the longest such period since the 1820s. Throughout the latter part of this period, beginning in early 2003, the Democratic minority party in the U.S. Senate has been waging an unprecedented filibuster campaign to deprive up-or-down votes for 10 judicial nominees who would otherwise be easily confirmed by majority vote to the federal circuit courts of appeal.

These appellate courts, where about 165 judges preside within 12 geographic circuits, including the nation's capital, occupy the federal judicial level immediately below the U.S. Supreme Court. The circuit courts hear appeals from the nation's 94 district courts, where about 670 U.S. district judges hold trials involving federal issues, both civil and criminal.

The Democrats' judicial-filibuster campaign has been unprecedented in scope, intensity and duration. Not surprisingly, therefore, it has achieved its primary goal, which has been to eviscerate President Bush's electorally transmitted constitutional prerogative to shape the federal courts. Indeed, during their first terms in office, not one of all the other post-World War II presidents has been comparably constrained from fulfilling this constitutional mandate at the circuit-court level. Never before has the White House's opposition party in the Senate systematically deprived up-or-down votes for circuit-court nominees in the manner that the Democrats have throughout the first term of George W. Bush, particularly through their unprecedented use of the filibuster since early 2003.

On his dalythoughts.com blog, Gerry Daly, whose results were recently highlighted in the Economist magazine, has elucidated the postwar record. With minor adjustments explained below, here are Mr. Daly's provocative findings.

During the first complete two-year Congress of their presidencies, postwar presidents achieved the following confirmation rates for their circuit-court nominees: Truman (80th Congress; 3/3: 100 percent); Eisenhower (83rd; 12/13: 92.3 percent); Kennedy (87th; 17/22: 77.3 percent); Johnson (89th; 25/26: 96.2 percent); Nixon (91st; 20/23: 87 percent); Ford (94th; 9/11: 81.8 percent); Carter (95th: 12/12: 100 percent); Reagan (97th: 19/20; 95 percent); G.H.W. Bush (101st; 22/23: 95.7 percent); Clinton (103rd: 19/22: 86.4 percent); G.W. Bush (107th; 17/32: 53.1 percent).

Thus, for the first complete two-year Congresses of the 10 postwar presidencies preceding George W. Bush's, the circuit-court confirmation rate averaged 91.2 percent. For Mr. Bush, it was 53.1 percent. Moreover, before George W. Bush, no president's confirmation rate during his first complete Congress fell below 77 percent, which is nearly 50 percent (and 24 percentage points) higher than Mr. Bush's confirmation rate. It is also worth noting that the three nominees returned by Mr. Clinton's first Congress were confirmed during his second, effectively raising his first-Congress rate to 100 percent.

And if we exclude Mr. Bush's two circuit-court nominees who were appointed to the federal judiciary by Mr. Clinton and nominated for the circuit-court bench by Mr. Bush as an unrequited, magnanimous gesture to the Democrats, then Mr. Bush's first-Congress confirmation rate falls to 50 percent (15/30), which is half Mr. Clinton's first-Congress effective rate.

Let's now aggregate the data for a president's first four-year term, while making minor, necessary adjustments (e.g., folding the 79th Congress into the first term of Truman, who succeeded Roosevelt in April 1945; using 1965-1968 as Johnson's first term; and ignoring Ford, who served less than 2.5 years). Then, the first-term confirmation rates are the following: Truman (10/11: 90.9 percent); Eisenhower (23/26: 88.5 percent); Kennedy/Johnson, 1961-1964 (24/29: 82.8 percent); Johnson, 1965-1968 (37/39: 94.9 percent); Nixon (38/41; 92.7 percent); Carter (56/61: 91.8 percent); Reagan (33/42: 78.6 percent); G.H.W. Bush (42/54: 77.8 percent); Clinton (30/42: 71.4 percent); G.W. Bush (35/66: 53 percent).

Thus, since World War II, for the nine four-year, first-term presidencies that preceded George W. Bush's, the circuit-court confirmation rate averaged 85.5 percent. For Mr. Bush's first term, the rate was a relatively dismal 53 percent.

Finally, throughout the same nine postwar, first-term, four-year presidencies that preceded George W. Bush's, Congress returned a total of 46 circuit-court nominations to the president upon adjournment. Those 46 averaged five per four-year term over 36 years. During Mr. Bush's first four-year term, 30 circuit-court nominations were returned by Congress.

This is a record of unprecedented obstructionism that simply cannot be permitted to continue through systematic filibustering.